Nos. 06-340 and 06-549

In The Supreme Court of the United States

NATIONAL ASSOCIATION OF HOMEBUILDERS, *et al.*,

Petitioners,

v.

DEFENDERS OF WILDLIFE, *et al.*,

Respondents.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Petitioner,

v.

DEFENDERS OF WILDLIFE, *et al.*,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICUS CURIAE BRIEF ON THE MERITS OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether Section 7(a)(2) of the Endangered Species Act, which requires each federal agency to ensure that its actions do not jeopardize the continued existence of a listed species or modify its critical habitat, constitutes an independent source of authority which overrides statutory mandates or constraints placed upon an agency's discretion by other Acts of Congress?

2. Whether a court may append additional criteria to Section 402(b) of the Clean Water Act to require that state NPDES programs include protections for endangered species?

3. Whether the Court of Appeals incorrectly concluded that the EPA's approval of Arizona's NPDES permitting program was the legal cause of any future impact to endangered species resulting from potential future private land use activities?

4. Whether the Court of Appeals correctly held that the EPA's decision to transfer NPDES permitting authority to Arizona under the Clean Water Act was based upon inconsistent interpretations of Section 7(a)(2) of the Endangered Species Act; and, if so, whether the Court of Appeals should have remanded to the EPA for further proceedings without ruling on the interpretation of Section 7(a)(2)?

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AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION

Mountain States Legal Foundation ("MSLF") respectfully submits this *amicus curiae* brief on behalf of itself and its members in support of Petitioners. Pursuant to Supreme Court Rule 37(2)(a), this *amicus curiae* brief is filed with the written consent of all parties.[1]

IDENTITY AND INTEREST OF *AMICUS CURIAE*

MSLF is a nonprofit, membership, public-interest law foundation dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, limited and ethical government, and the free enterprise system. MSLF's members include businesses and individuals who live and work in every state of the country. A large number of MSLF's members work in businesses involved in the utilization and development of natural resources and, as a result, are involved actively in many environmental issues. Moreover, MSLF and its members have an interest in ensuring that federal laws and regulations, including the Clean Water Act ("CWA")[2] and the Endangered Species

[1] Copies of the consent letters have been filed with the Clerk of the Court. In compliance with Supreme Court Rule 37(6), MSLF represents that no counsel for any party authored this brief in whole or in part and that no person or entity, other than MSLF, made a monetary contribution to the preparation or submission of this brief.

[2] Federal Water Pollution Control Act ("Clean Water Act"), 33 U.S.C. §§ 1251-1387.

Act (ESA"),[3] are implemented and enforced in a manner consistent with the Constitution of the United States.

SUMMARY OF THE ARGUMENT

Congress, in enacting the CWA, expressly intended the Act to be implemented in a cooperative manner, with primary responsibility assigned to the States and with the federal government assuming an oversight and advisory role. This has been the case, with 45 states assuming primary responsibility for the issuance of permits under the National Pollution Elimination Discharge System ("NPDES"), pursuant to Section 402(b) of the CWA. In order to assume responsibility, all that a state needs do is to apply with the United States Environmental Protection Agency ("EPA") and meet nine statutorily expressed conditions; Arizona has done just that. Section 402(b) has no provision for adding a tenth condition and it expressly mandates that the EPA approve any application that meets the nine requirements. Contrary to the express language of the CWA, Respondents and the Ninth Circuit have implied a tenth condition, that is, consultation under the ESA Section 7 for each permit issued by the State. ESA Section 7, *inter alia*, requires federal agencies to consult on projects for which the federal government issues a permit; however, Section 7 does not apply to actions in which the federal government has no discretion – as such consultation would be meaningless. Moreover, ESA Section 9 provides protections for endangered and threatened species; thus, even without Section 7 consultation, endangered and

[3] Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544.

threatened species are protected. Accordingly, the Ninth Circuit erred in setting aside the EPA's non-discretionary approval of Arizona's NPDES program, as mandated by CWA Section 402(b).

ARGUMENT

On December 5, 2002, the EPA approved the State of Arizona's application to administer the NPDES program under Section 402(b) of the CWA, 33 U.S.C. § 1342(b). Section 402(b) provides that the EPA "shall approve each submitted program" unless the EPA "determines that adequate authority does not exist" for the state to administer the program in compliance with nine specified criteria. There was no dispute that Arizona's program satisfied those criteria. Instead, environmental groups contended that the EPA violated Section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), because the EPA did not sufficiently analyze the effects of the loss of, nor require a sufficient substitute for, the consultation with the United States Fish and Wildlife Service ("FWS") that would have occurred had the EPA administered the program instead of Arizona. A majority of the Ninth Circuit panel agreed and vacated the EPA's approval of Arizona's program. The National Association of Homebuilders and the EPA (collectively "Petitioners") separately filed Petitions for *Writs* of *Certiorari* on September 6, 2006, and October 23, 2006, respectively. On January 5, 2007, the Court granted *certiorari*.

I. ESA SECTION 7(a)(2) CONSULTATION REQUIREMENTS DO NOT EXTEND TO NON-DISCRETIONARY ACTIONS MANDATED BY OTHER ACTS OF CONGRESS.

The heart of the ESA for federal actions is Section 7, which requires that every federal agency ensure that its actions are not likely to "jeopardize" a listed species or "adversely modify" its critical habitat. Section 7(a)(2) provides:

> Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species. . . .

16 U.S.C. § 1536(a)(2). If, during formal consultation, it is determined that the proposed federal action will likely jeopardize a listed species or its critical habitat, the consulting agency (here the FWS) must develop a "reasonable and prudent alternative" ("RPA") that will reduce the likelihood of jeopardy. The FWS, by regulation has defined RPAs as:

> alternative actions identified during formal consultation that can be implemented in a manner consistent with the intended purpose of the action, *that can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction*, that is economically and technologically feasible, and that the Director believes would avoid the likelihood of jeopardizing the continued existence of listed species or resulting

> in the destruction or adverse modification of critical habitat.

50 C.F.R. § 402.02 (emphasis added). Thus, a valid RPA must be one that the action agency has the authority to implement. *Id.* Where the action agency has limited authority to modify the proposed action, a valid RPA could focus on mitigation activities that are within an agency's authority rather than on modifying the action itself. It also follows that when the action agency has no authority to modify the proposed action, no RPA could be valid. Accordingly, FWS regulations continue: "Section 7 and the requirements of this part apply to all actions in which there is *discretionary Federal* involvement or control." 50 C.F.R. § 402.03 (emphasis added). If there is no discretion to modify the proposed action, the outcome is predetermined and the need for consultation is eliminated. *Sierra Club v. Babbitt*, 65 F.3d 1502, 1509 (9th Cir. 1995) ("[W]here . . . the federal agency lacks discretion to influence the private action, consultation would be a meaningless exercise; the agency simply does not possess the ability to implement measures that inure to the benefit of the protected species."). This conclusion has been supported by virtually every court to answer the question.

In *Strahan v. Linnon*, 967 F.Supp. 581 (D.Mass. 1997), a citizen activist brought claims against the United States Coast Guard, alleging that the Guard's activities, which included both its own vessel operations as well as its issuance of "certificates of documentation" to private whale-watching ships, were agency actions requiring compliance with Section 7(a)(2). The Guard had initiated consultation on its vessel operations but not on its issuance of certificates to the whale-watching vessels. *Id.* at 620. The court construed the regulations governing

issuance of such certificates as requiring the Coast Guard to issue them if the applicant met certain criteria. *Id.* at 621. The court ruled that Section 7 did not apply to certification because it was "nondiscretionary agency action within the meaning of the ESA." *Id.* The court framed the question as "whether Congress intended the ESA to apply to nondiscretionary, ministerial acts of federal agencies." *Id.* at 620. The court held that, if "the agency has no discretion to modify the activity at issue to accommodate the mandate of the ESA, then the consultation process would be pointless." *Id.* at 621.

In a later stage of the same litigation, the court ruled against a facial challenge to 50 C.F.R. § 402.03. The plaintiff argued that the regulation was inconsistent with the ESA because the statutory text required Section 7 compliance for "any" action authorized, funded, or carried out by an agency. The challenge was rejected because the six year statute of limitations for such facial challenges had expired, *id.* at 607; however, the court remarked that it would have rejected the challenge even if it had not been time-barred, based on the *Sierra Club v. Babbitt* court's reading of 50 C.F.R. § 402.03 and the deference courts give to agency interpretations of statutes. *Id.* The court reaffirmed its reasoning that consultation is meaningless where an agency lacks discretion to modify its actions to accommodate the ESA. *Id.*

In 2003, the District Court for the District of Columbia addressed a variation on this issue within the context of Colorado River management. In *Defenders of Wildlife v. Norton*, 257 F.Supp.2d 53, 67-69 (D.D.C. 2003), the court considered whether the Bureau of Reclamation, which operated various water storage and delivery projects on the river, was required to consult on the impact of its

operations on listed species that lived downstream in Mexico. *Id.* at 59-62. The Bureau had consulted previously on such impacts, but after coming to the conclusion that it had no control over conditions in Mexico, it declined to continue consulting on its operations as they affected those species. *Id.* Acknowledging that the Bureau's operations were having demonstrable impacts on downstream species in Mexico, the court nonetheless ruled that the ESA did not apply to the Bureau's actions. *Id.* at 63-64.

The *Defenders of Wildlife v. Norton* opinion was grounded in an extensive body of law, including international treaties, Supreme Court precedent, numerous binding contracts and federal statutes, that effectively left the Bureau with no discretion whatsoever in how it managed water in the Colorado River. "The formulas established by the Law of the River strictly limit Reclamation's authority to release additional waters to Mexico." *Id.* at 67-68. In other words, while the Bureau's activities were harming the downstream listed species, there did not appear to be anything the agency could do about it. Hence, the court concluded, Section 7 did not apply. The court appeared to wrestle with the question, noting that the outcome in *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), "somewhat counsels against" holding 50 C.F.R. § 402.03 as limiting the Bureau's ESA duties in this situation. *Id.* at 67. However, in the end it found that consultation was not required because it was "unlikely that any case will present facts that more clearly make any agency's actions nondiscretionary than this one." *Id.* at 69.

The Western District of Washington handed down the most recent ruling on this issue. In *National Wildlife Federation v. Federal Emergency Management Agency*, 345

F.Supp.2d 1151 (W.D.Wash. 2004) ("*NWF v. FEMA*"), the court considered FEMA's implementation of a floodplain management program that purportedly threatened Chinook salmon in Puget Sound. *Id.* at 1168-75. The *NWF v. FEMA* court, relying on Ninth Circuit precedent, turned to the enabling statute, the National Floodplain Insurance Program ("NFIP"), to determine whether there was discretion to trigger Section 7. With respect to the actual provision of flood insurance, the court concluded that: "FEMA has no discretion to deny flood insurance to a person in a NFIP-eligible community. . . . As a result, FEMA has no obligation to consult with [the National Marine Fisheries Service] regarding the actual sale of flood insurance." *Id.* at 1174; *contra Florida Key Deer v. Stickney*, 864 F.Supp. 1222 (S.D.Fla. 1994) (holding that, even if the proposed actions were non-discretionary, FEMA was required to consult under ESA Section 7.).[4]

As the above-discussed cases show, nowhere is it clearer that Section 7 does not apply to non-discretionary actions than when the federal agency is acting under the direct mandate of Congress. Such is the case with EPA's

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[4] In addition to the cases analyzed in depth above, many other courts have utilized agency discretion as a key element necessary to require Section 7 consultation. *See, e.g., California Sportfishing Prot. Alliance v. Fed. Energy Regulatory Comm'n*, 472 F.3d 593 (9th Cir. 2006); *W. Watersheds Project v. Matejko*, 468 F.3d 1099 (9th Cir. 2006); *In re Operation of the Missouri River System*, 421 F.3d 618 (8th Cir. 2005); *Ground Zero Center for Non-violent Action v. United States Dep't of the Navy*, 383 F.3d 1082 (9th Cir. 2004); *Turtle Island Restoration Network v. Nat'l Marine Fisheries Serv.*, 340 F.3d 969 (9th Cir. 2003); *Rio Grande Silvery Minnow v. Keys*, 333 F.3d 1109 (10th Cir. 2003); *Karuk Tribe of California v. United States Forest Serv.*, 379 F.Supp.2d 1071 (N.D.Cal. 2005).

approval of a state's NPDES permitting program under CWA Section 402(b).

II. THE CLEAN WATER ACT DOES NOT PROVIDE SPECIFICALLY FOR THE CONSERVATION OF UPLAND THREATENED AND ENDANGERED SPECIES.

A. The NPDES Program Was Designed To Promote Clean Water, Not Necessarily To Conserve Terrestrial Species.

Section 301 of the CWA establishes a broad prohibition against the "discharge of any pollutant by any person" except when in compliance with the CWA's permit requirements, effluent limitations, and other enumerated provisions. 33 U.S.C. § 1311(a). The NPDES permit program implements Section 301's prohibition on unauthorized discharges by requiring a permit for every discharge of pollutants from a point source into waters of the United States. *Id.* § 1342. A NPDES permit is issued by either the EPA or by a state if the state has received permitting authority from the EPA pursuant to Section 402(b). *Id.* § 1342(b).

The primary purpose of a NPDES permit is to establish enforceable (*i.e.*, measurable) effluent limitations. ENVIRONMENTAL LAW HANDBOOK § 6.5 (17th Ed.; Thomas F.P. Sullivan, Ed.). The CWA mandates a two-part approach to establishing effluent limitations: technology-based limitations and water quality-based limitations. *See, e.g.*, 33 U.S.C. §§ 1311(b), 1313, 1316, 1317. But, under either approach, the NPDES permit establishes a maximum numeric standard that may not be exceeded by the permit holder.

In addition to numerical effluent limitations, the permit may establish a number of other enforceable conditions, such as monitoring and reporting requirements, a duty to properly operate and maintain systems, as well as record keeping, inspection, and entry requirements; however, each of these additional conditions is grounded in the discharge system or monitoring system. 40 C.F.R. § 122.41. Thus, the primary purpose of the NPDES program is to limit total system-wide discharges of pollutants to a set level. While non-aquatic and upland species of plants and wildlife undoubtedly benefit from a cleaner environment, these benefits are simply collateral to the primary mission of the NPDES program. To attempt to stretch the reach of the NPDES program to regulate land use in areas far removed from the water body in which a storm drain discharges is not supported by the policy of the CWA.

B. The NPDES Program Was Developed Specifically To Incorporate Cooperative Federalism.

The CWA anticipates a partnership between the States and the Federal Government, driven by a shared objective: "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). In fact, Section 101 of the CWA declares:

> It is the policy of the Congress to recognize, preserve, and protect the *primary responsibilities and rights of States* to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources. . . .

Id. § 1251(b) (emphasis added). Toward this end, Section 402 establishes the NPDES permitting regime, and describes two types of permitting systems: state permit programs that must satisfy federal requirements and be approved by the EPA, and a federal program administered by the EPA.

Section 402(b) authorizes each State to establish "its own permit program for discharges into navigable waters within its jurisdiction." *Id.* § 1342(b). While an authorized state administers the NPDES program, the EPA retains the authority to block the issuance of any state-issued permit that is outside the guidelines and requirements of the Act. *Id.* § 1342(d)(2). Moreover, the language chosen reflects Congress's intent that primary responsibility under the CWA be with the States: "The permit program of the [EPA] . . . and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a *State permit program* and permits issued thereunder under [Section 402(b)]." 33 U.S.C. § 1342(a)(3) (emphasis added); *see also Natural Res. Defense Council, Inc. v. Envtl. Prot. Agency*, 859 F.2d 156, 173 (D.C.Cir. 1988) ("Congress repeatedly articulated its expectation that the states would play a major role in administering [the NPDES program]").

This cooperative federalist structure has been overwhelmingly successful, with 45 states administering state NPDES programs. However, this successful program is put at risk if the majority opinion of the Ninth Circuit is allowed to stand. As the dissent, in response to the Ninth Circuit's denial of a rehearing *en banc*, notes:

> If the ESA were as powerful as the majority contends, it would modify not only EPA's obligation under the CWA, but every categorical mandate

> applicable to every federal agency. We should be particularly chary of holding that the ESA made such sweeping changes when the agency charged with implementing the statute has adopted a regulation allowing the ESA to coexist peacefully with all categorical mandates. *See* 50 C.F.R. § 402.03. There is no justification for nullifying countless congressional directives by casting aside the agency's authoritative interpretation of the ESA, formally adopted pursuant to notice and comment procedures.

Defenders of Wildlife v. United States Envtl. Prot. Agency, 450 F.3d 394, 399 n.4 (9th Cir. 2006) (Kozinski, J., dissenting from denial of rehearing *en banc*).

C. The CWA Provides Nine Criteria That States Must Meet To Administer The NPDES Program; There Is No Provision To Add A Tenth Criterion.

Section 402(b) of the CWA provides:

> [T]he Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program.

33 U.S.C. § 1342(b). Moreover, the EPA must approve the state NPDES program if the program satisfies nine enumerated criteria. *Id.* ("The Administrator *shall* approve each such submitted program unless he determines that" the program does not satisfy the criteria listed.) (emphasis added); *id.* § 1342(b)(1)-(9) (listing the criteria). Section 402(b) does not provide for the inclusion of any additional criteria or the consideration of any other factor. *Id.* § 1342(b); *Am. Forest & Paper Ass'n v. United States Envtl. Prot. Agency*, 137 F.3d 291 (5th Cir. 1998) (holding the EPA may not impose additional criteria beyond those expressly provided in Section 402(b)). Moreover, it is undisputed that the nine criteria were met in this case; therefore, the EPA was required to approve Arizona's assumption of the NPDES program.

III. ALTHOUGH ESA SECTION 7(a)(2) CONSULTATION REQUIREMENTS DO NOT APPLY TO STATE NPDES PERMITTING PROGRAMS, ESA SECTION 9 PROVIDES AMPLE PROTECTIONS TO THREATENED AND ENDANGERED SPECIES.

While ESA Section 7(a)(2)'s consultation requirements do not apply to state NPDES permitting decision, it does not necessarily follow that an entire population of threatened and endangered species will be extirpated. ESA Section 9 sets forth two separate sets of prohibitions, one applicable to listed fish and wildlife, and the other to listed plants. 16 U.S.C. § 1538. For fish and wildlife, Section 9 makes it unlawful for any person subject to the jurisdiction of the United States to "take"[5] any listed species

[5] Section 3 defines take as: "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any

(Continued on following page)

within the United States or its territorial seas, or upon the high seas. *Id.* § 1538(a)(1). With respect to listed plant species, Section 9 makes it unlawful for any person subject to the jurisdiction of the United States to maliciously damage or destroy any listed plant, or remove any listed plant from federal lands. *Id.* § 1538(a)(2). Thus, listed species are protected against unlawful acts by the plain language of Section 9 and its implementing regulations; in fact, any person who violates these laws may be subject to criminal penalties, not just civil fines. *Id.* § 1540.

The ESA provides for few exceptions to the statutory hammer of Section 9; however, a permit holder may avoid liability for "incidental" takes of listed species so long as he engages in consultation with the FWS and follows any RPA's provided. Two mechanisms are available to the permit holder, Section 7 and Section 10. *Id.* §§ 1536, 1539. Under ESA Section 7(a)(3), a permit holder may request the action agency to enter into consultation with the FWS if he has reason to believe that a listed species may be present in the area affected by his project and that implementation of the project will likely affect the species. *Id.* § 1536(a)(3). Under ESA Section 10, the FWS may exempt projects that may impact listed species so long as any taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity. *Id.* § 1539(a)(1)(B). Once initiated, consultation under either option proceeds in the same manner as if it were initiated by the federal

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such conduct." 16 U.S.C. § 1532(18). Further, "harm" in the definition of "take" means: an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavior patterns, including breeding, feeding or sheltering." 50 C.F.R. § 17.3.

agency under Section 7(a)(2), except that, under Section 10, the applicant must provide the FWS a detailed, and often costly, conservation plan. *Id.* §§ 1536(a), 1539(a)(1)-(2).

The majority panel of the Ninth Circuit cited, as an additional reason for setting aside the EPA's authorization of Arizona's NPDES program, its opinion that "there is no indication that section 9 is or will be enforced meaningfully." *Defenders of Wildlife v. United States Envtl. Prot. Agency*, 420 F.3d 946, 975 (9th Cir. 2005). However, the panel's unfounded opinion that the FWS will not enforce its congressionally-mandated duties may not stand as a reason to set aside an agency's decision, especially in an administrative record case where the agency is assumed to be conducting itself in accordance with the law. America's system of administrative law, and the deference provided to the agencies charged with administering the laws of the United States, is founded on this concept. Moreover, courts should assume that people will follow the law, and in this case, not destroy or harm listed species. Thus, absent any showing that the FWS will not perform its statutorily-mandated functions, the Ninth Circuit exceeded its bounds by relying on its own unsubstantiated belief that Section 9 would not provide a meaningful deterrent to the taking of listed species.

CONCLUSION

For the foregoing reasons, Mountain States Legal Foundation respectfully requests that this Court overturn the decision of the Ninth Circuit and hold that the EPA's transfer of NPDES permitting to the State of Arizona was in accordance with both the Clean Water Act and the Endangered Species Act.

Respectfully submitted,

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